

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LAURA FUJISAWA, et al.	)	No. C07-5642 BZ
	)	
Plaintiff(s),	)	Related Cases: C07-3431 BZ
	)	C08-4118 BZ
v.	)	C09-2016 BZ
	)	
COMPASS VISION, INC., et	)	<b>ORDER ON PLAINTIFFS' MOTION</b>
al.,	)	<b>IN LIMINE TO PRECLUDE</b>
	)	<b>CERTAIN EXPERT TESTIMONY</b>
	)	
Defendant(s).	)	
	)	
_____	)	

This Order addresses plaintiffs' corrected motion in limine to preclude cumulative and/or incompetent expert testimony (Docket No. 343).

To the extent this motion objects to the competency and qualifications of any of defendants' proffered experts, I am unable to rule on them in as much as I do not have their CV's or any other information about their background. These issues will either be resolved at a hearing on the first day of trial or at a Daubert hearing.

Plaintiffs' motion to preclude Dr. Wu from presenting additional opinions no. 1 and no.6 is **DENIED**. From the

1 information I do have about his background, and especially  
2 his roles as former inspector for the College of American  
3 Pathologists and Toxicology Programs and a current member of  
4 Toxicology Resource Committee, Dr. Wu appears to be qualified  
5 to render these opinions. If plaintiff has any doubts about  
6 the breath of his experience, she can explore that in cross-  
7 examination.

8 I do not understand the dispute over Dr. Wu's opinion  
9 no. 3. It appears to be a mere recitation of testimony give  
10 by Sodergren and Stafford. If as cited in his report, it is  
11 information on which he based his opinion, unless there is a  
12 dispute as to what Sodergren and Stafford testified,  
13 ordinarily Dr. Wu would be entitled to base his opinion on  
14 their testimony.

15 Dr. Wu will not be permitted to render opinion no. 4, at  
16 least as it is stated. He will not be permitted to testify  
17 to his opinion of the extent of a testing laboratory's legal  
18 liability or who is legally obligated to make licensing  
19 decisions. Nor will he be permitted to testify to the  
20 processes followed in Connecticut, Massachuttes and New York  
21 for declaring a positive urine drug test result. That does  
22 not appear to be an issue in this case, and it is not clear  
23 how the procedures followed in those states relate to the  
24 procedures followed in California. Absent further  
25 foundational testimony, he will not be permitted to render  
26 this opinion.

27 As to opinion no. 5, absent further explanation for why  
28 he thinks that the SAMHSA "opinion is somewhat taken out of

1 context for this case" he will not be permitted to render  
2 that opinion. If he has knowledge that SAMHSA regulates  
3 mandatory work place drug testing and not voluntary  
4 compliance programs, and his understanding is not disputed,  
5 and this statement supports one of his opinions, he will be  
6 permitted to so testify. He will be permitted to testify to  
7 the last sentence of opinion no. 5.

8 Dr. Flanagan's testimony, to the extent that it is  
9 consistent with his report, will not be allowed under Rule  
10 702 and 403. Having read the report, I conclude that as  
11 presently constituted it will not assist the jury in  
12 understanding the evidence or determining a fact at issue for  
13 numerous reasons. It is not clear as to what disputed issue  
14 in the case Dr. Flanagan's opinion is relevant. Nothing in  
15 his report appears to relate to Dr. Fujisawa. Indeed, it  
16 does not even appear that he has reviewed her records, as  
17 opposed to the records of a number of other individuals, who  
18 are not part of this case. To allow him to render an opinion  
19 as to Dr. Fujisawa by generalizing from his review of records  
20 of other individuals, would only not be helpful to the jury  
21 but would be prejudicial to plaintiff. To the extent that he  
22 opines as to the reasons for having diversion and recovery  
23 programs or monitoring the conduct of pharmacists, it is not  
24 clear that he is qualified to render such an opinion; that  
25 testimony should properly come from the Board. Nor is there  
26 anything in his report that suggests that he is qualified to  
27 render such opinions as the ETG test "is the best test for  
28 monitoring a participant's compliance" or a number of the

1 other sweeping opinions in his report.

2 The Court will make a final decision on Mr. Schults on  
3 the first day of trial. However, Mr. Schults will not be  
4 permitted to opine as to legal conclusions such as "the  
5 essential contractual obligation of a private toxicology  
6 laboratory." The overriding concern I have with Mr.  
7 Schults's report is that it is not clear to me under Rule  
8 702, how his testimony would help the jury or what disputed  
9 issues he is addressing. Much of his report would seem to  
10 address what Dr. Brown, the medical review officer did or  
11 did not do. To the extent that it addresses the contractual  
12 claims that Compass may have against Maximus, they are not  
13 part of this trial.

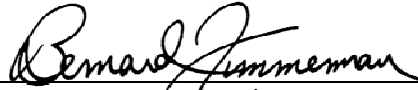
14 If it is established that he has a technical or  
15 scientific background to opine that the SAMHSA statement is  
16 scientifically unsupportable, he will be permitted to render  
17 that opinion. However, I do not have his CV.

18 Dr. Brown can testify as a factual witness to what she  
19 did as a medical review officer and her interactions with the  
20 plaintiff. However, I am unable to see the relevance of some  
21 of the opinions she expresses in her report or how they will  
22 assist the jury in resolving disputed issues of fact. For  
23 example, she opines that all diversion programs should have  
24 either a medical director or medical consultant. I am not  
25 aware that this is an issue in this lawsuit. Once again,  
26 without having the benefit of Dr. Brown's CV, I am unable to  
27 determine whether she is qualified to render some of opinions  
28 she renders with respect to participants in recovery

1 programs.

2 I believe the rest of the disputed experts have been  
3 withdrawn.

4 Dated: November 16, 2010



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Bernard Zimmerman  
United States Magistrate Judge

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